



6-1-1999

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Recommended Citation

James A. Strazzella, *Relationship of Double Jeopardy to Prosecution Appeals*, 73 Notre Dame L. Rev. 1 (1997).

Available at: <http://scholarship.law.nd.edu/ndlr/vol73/iss1/9>

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ARTICLES

THE RELATIONSHIP OF DOUBLE JEOPARDY TO PROSECUTION APPEALS

*James A. Strazzella**

The complexity of double jeopardy law has the potential to pull related doctrines into its whirlpool. The relationship of double jeopardy protection to prosecution appeals is frequently misunderstood, seldom clearly discussed, and often misstated in statutes and cases, even in Supreme Court case law on occasion. In light of these misconceptions, the precise relationship between double jeopardy and prosecution appeals bears analysis and clarification.

Federal double jeopardy law is defined in a considerable amount of case law developed in appeals brought by both defendants and prosecutors. In an important class of these cases (dealt with in this Article) the double jeopardy issue arises in the context of the possible dismissal of a prosecution appeal, with appealability turning on whether double jeopardy bars further trial court proceedings. In fact, much of the content of double jeopardy law is recent, the by-product of motions to dismiss appeals filed by federal prosecutors under a revised statute broadening their right to appeal.¹ The fact that Supreme

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1 Most of this Supreme Court litigation arose beginning in the 1970s, following a federal statutory amendment widening the United States prosecution appeal rights. See *infra* text accompanying note 19. A combination of two factors made it unnecessary earlier for the Supreme Court to consider double jeopardy issues in the context of prosecution appeal rights, except in limited circumstances. One factor was the statutory restriction on federal prosecutors' appeal rights existing prior to amendment of the federal prosecution appeal act. See *infra* note 24; see also *United States v. Jenkins*, 420 U.S. 358, 369 (1975) (collecting recent Supreme Court cases to that point); *United States v. Scott*, 437 U.S. 82 (1978) (limiting a different aspect of *Jenkins* and collecting other recent cases dealing with the 1970 statute). Moreover, until the Double Jeopardy Clause was applied to the states in 1969, see *infra* note 2, state convic-

Court and lower court cases have repeatedly decided double jeopardy issues in the context of prosecution appeals makes it clear that there is a relationship between double jeopardy and appealability, but the connection of double jeopardy to prosecution appeals is frequently misconceived. When recent cases do mention any rationale, the discussions often obscure the precise reasons for the result.

It is an important premise of this Article that double jeopardy law does not itself bar prosecution appeals, despite frequent assertions to the contrary. When it is involved in barring a prosecution appeal, double jeopardy doctrine does so only in combination with some additional legal principle. This two-step analytical process, explored in this Article, has important—and potentially different—ramifications for state and federal cases which can be better understood in light of some related axioms of double jeopardy law.

I. DOUBLE JEOPARDY BACKGROUND

Double jeopardy protection is designed as a trial-level protection, protecting the defendant against being twice put in jeopardy for the same offense.² The protection bars repetition of a particular occurrence: subjecting a defendant to “jeopardy.” This occurrence is constitutionally defined as occurring at the point at which a jury is sworn, or (in a non-jury trial) the point at which the judge begins to receive evidence,³ thereby protecting a defendant from certain second-jeopardy actions in the trial court. Protecting the defendant from litigation in an appellate court proceeding falls outside the protection from second jeopardy because the appeal itself does not subject the

tions involving double jeopardy issues of any sort reached the Supreme Court only in limited doses.

2 The U.S. Constitution’s Double Jeopardy Clause, applicable in both federal and state prosecutions, provides: “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. CONST. amend. V (applied to the states in *Benton v. Maryland*, 395 U.S. 784 (1969)). State constitutions also typically contain double jeopardy protection. See generally James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 4 n.1 (1995). Although these state provisions may differ somewhat from the federal clause in text or judicial interpretation, they nevertheless also conceive the double jeopardy bar as a trial level protection. This Article’s discussion of the federal clause therefore generally applies to state clauses as well.

3 See *Crist v. Bretz*, 437 U.S. 28, 37–38 (1978) (defining point at which jeopardy attaches in jury trial for purposes of state as well as federal trial; also stating in dictum when jeopardy attaches in non-jury trial). For other authorities relating to the point at which jeopardy attaches, see Shellenberger & Strazzella, *supra* note 2, at 121 n.414, 162 n.565.

defendant to a second "jeopardy" in its constitutionally defined sense. This conclusion impliedly follows not only from the definition of "jeopardy," but also from the historical purposes served by the Clause.

The possibility that a ruling favorable to the defendant may be reviewed in a prosecution-instigated appellate proceeding may surely involve burdens of a sort if the defense participates in the appellate litigation. Nevertheless, those potential burdens—however intimidating or onerous they might appear—are not the type of trial-court dangers historically deserving of constitutional protection.⁴ In varying degrees, Supreme Court language appears to recognize as much,⁵ as have the appellate cases discounting the scarce direct claim that appellate litigation in and of itself runs afoul of the Double Jeopardy Clause.⁶ The conclusion is also consistent with, and follows from,

4 *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), contains the much-repeated formulation of the protection offered by the Clause: "[The] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." For further discussion concerning the history and purposes of double jeopardy law, including the development of modern double jeopardy principles, see Shellenberger & Strazzella, *supra* note 2, at 117–21, 133–70.

5 See *United States v. DiFrancesco*, 449 U.S. 117, 132–36 (1980) (sustaining prosecution's statutory right to appeal sentence, noting that the "double jeopardy focus . . . is not on the appeal but on the relief that is requested" and further stating that double jeopardy considerations "have no significant application to the prosecution's statutorily granted right to review a sentence"); *United States v. Wilson*, 420 U.S. 332, 336–42 (1975) (agreeing with prosecution argument that "the constitutional protection against Government appeals attaches only where there is danger of subjecting the defendant to a second trial for the same offense" and further stating that "[t]he development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial"); see also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (noting *Wilson's* interpretation that "the controlling constitutional principle focused on prohibitions against multiple trials" and discussing reasons behind double jeopardy protection); *United States v. Jenkins*, 420 U.S. 358, 365 (1975) (discussing in dictum, "[t]o be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect"). *But see* the language in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (discussed *infra* in text accompanying notes 50–62).

6 See *Taylor v. United States*, 207 U.S. 120 (1907) (finding it unnecessary to discuss at length a defendant's contention that the government cannot be allowed a writ of error in a criminal case when the indictment was quashed, and stating: "We do not perceive the difficulty If the Fifth Amendment has any bearing, the [Criminal Appeals A]ct of 1907 is directed to judgments rendered before the moment of jeopardy is reached"); *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967) (en banc),

those Supreme Court cases refusing to dismiss government appeals when the remedy would not require further jeopardy.⁷ Were it otherwise, statutes allowing prosecution appeals under any circumstances would be unconstitutional, a conclusion that would invalidate the long-accepted view that such appeals may be allowed if statutorily authorized.⁸ Moreover, such a restrictive view would encompass and preclude any prosecution appeal to a higher appellate court from an

rev'd on other grounds, 393 U.S. 410 (1969) (discussed below); *Commonwealth v. Therrien*, 420 N.E.2d 897, 899 (Mass. 1981) (discussing in dictum that earlier case stands for the proposition that "without raising any significant double jeopardy question, this court properly may consider, pursuant to statute, a case on further appeal where the [intermediate court] has reversed a conviction" and noting earlier that defendant made no claim that prosecution appeal is barred by Double Jeopardy Clause); *see also* *United States v. Bitty*, 208 U.S. 393 (1908) (rejecting defendant's constitutional challenge to statute allowing government review in Supreme Court when demurrer sustained while not allowing defendant a similar immediate appellate review when demurrer denied, and generally stating that statutory authorization did not violate any constitutional right of the accused).

In *Spinelli*, the convicted defendant's initial appeal was heard by a circuit court panel which reversed the conviction on Fourth Amendment grounds. The government successfully petitioned for rehearing en banc and the defendant objected that a rehearing would violate his constitutional protection against double jeopardy. The court en banc noted that "[a]ppellant cites no authority for this position and we are not persuaded by his argument" and further stated that the exercise of the government's appeal right "does not necessarily violate a criminal defendant's right against double jeopardy." 382 F.2d at 876-77. The court en banc ultimately asserted that it:

need not pursue the matter of constitutionality of government appeals in that an appellate court's reconsideration of its own position on a question of law, is far different from an appeal from a final decision of a trial court. As long as this Court has jurisdiction over the cause, it has the express authority [under a specified statute and rule] to rehear and, if necessary, modify its decisions.

Id. at 877. Concluding that, "[o]bviously, an appellate court's reconsideration of its legal opinion is completely unlike requiring a criminal defendant to stand trial a second time on a factual issue after once being acquitted," the court decided it retained "the jurisdiction necessary to question and change any tentative decisions of the Court without subjecting appellant to any form of additional jeopardy." *Id.*

Spinelli's approach (basing its decision on the existence of statutory and rule jurisdiction) appears to beg the issue since the defendant's claim would impliedly call into question the constitutionality of any statutory or rule power granted the court to undertake the en banc proceedings about which the defendant complained. In any event, the court's narrow holding appears to indirectly sustain only the constitutionality of the en banc rehearing. Only the more general statements of the court favorably imply the constitutionality of prosecution appeals from one court to another.

⁷ *See, e.g.*, *United States v. Wilson*, 420 U.S. 332 (1975) (representing the key case on this point).

⁸ *See infra* text accompanying note 18; *Bitty*, 208 U.S. at 393, discussed *supra* note 6; *see also* *Arizona v. Manypenny*, 451 U.S. 232, 249 (1981), quoted *infra* note 36.

adverse judgment in an intermediate appellate court, yet the cases are innumerable in which such second-tier appeals are pursued without double jeopardy protestation.⁹

The reason why double jeopardy is involved in prosecution appeals does not, therefore, ultimately lie in concern about the nature of the proceeding in the appellate court itself. What, then, is the precise importance of double jeopardy as a device for deciding appealability by the prosecution? The answer is found in the combination of the double jeopardy prohibition with some additional and separate principle which, at its base, will itself depend on a jurisdiction's own law. That separate principle will be either (1) a jurisdiction's own principle precluding advisory opinions that flow from moot cases, or (2) a jurisdiction's statutory formulation expressly linking prosecutor appealability to double jeopardy. Absent one of these additional factors, double jeopardy protection precludes only further impermissible trial-level jeopardy, but not a prosecution appeal.

II. ADVISORY OPINION BARS: MOOT CASES

In most jurisdictions the federal double jeopardy protection bars certain prosecution appeals by combining with a jurisdiction's own separate doctrine prohibiting advisory judicial opinions. Because of local law election, this is the combination of principles that brings double jeopardy into play in a great many states. (As will be seen, the same would be true in all federal appeals but for the fact that the existing statutory formulation of the government appeal right presently short-circuits the need for the federal courts to assert the federal case-or-controversy doctrine barring advisory opinions.) In this combination of principles, double jeopardy law becomes important because it affects the availability of the remedy that the prosecution is seeking on the appeal: an appellate judgment permitting certain problematic proceedings in the trial court. This remedy—the availability of which must be tested against the constraints of the Double Jeopardy Clause—in turn becomes implicated because of the interplay of a second doctrine: the widespread doctrine that a court will refuse to render advisory opinions (a doctrine usually devised from a jurisdiction's interpretation of its case-or-controversy requirement). It

⁹ See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991) (discussing how the prosecution successfully sought Supreme Court certiorari review after state appellate court rendered judgment for defendant); *Colorado v. Connelly*, 479 U.S. 157 (1986) (same); *United States v. Wade*, 388 U.S. 218 (1967) (involving Supreme Court certiorari review at government's request following lower appellate court judgment for defendant).

is the combination of the double jeopardy doctrine and the advisory opinion doctrine that ultimately accounts for the central role of double jeopardy issues in many appellate opinions considering motions to dismiss prosecution appeals. In combination, these doctrines present a question of the appellate court's jurisdiction to reach the underlying claim advanced by the prosecutor.

The 1909 Supreme Court case, *United States v. Evans*,¹⁰ illustrates the relationship of these two principles. *Evans* was not decided on constitutional grounds that bind the fifty states, but it is nevertheless important because the Supreme Court's reasoning has persuasive application to all jurisdictions which ban advisory opinions.¹¹ The case involved a statute applicable to prosecution appeals in the District of Columbia. On its face, the statute afforded the prosecution the same right of appeal as the defendant, "[p]rovided, [t]hat if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."¹² The lower appeals court interpreted the statute as not intended by Congress to authorize appeals in situations when further proceedings would be barred by double jeopardy.¹³ This conclusion rested on the observation that such an appeal was essentially moot because the defendant had no interest in the appeal and could not be made to participate.¹⁴ The Supreme Court noted this recognition of the adverse

10 213 U.S. 297 (1909).

11 *Evans* was decided shortly after the congressional debate on the 1907 federal appeals statute, a debate in which many legislators appeared to ignore concerns about the case-or-controversy requirement in the context of double jeopardy situations (*see infra* text accompanying notes 24–25). *Evans* is not entirely clear about whether the Court was deciding the case as a matter of local District of Columbia law (over which the Supreme Court then maintained general supervisory power) or as a general matter of federal law applicable to all federal courts. In any event, by upholding the statutory interpretation made by the local appeals court (the Court of Appeals of the District of Columbia) and expressly addressing only the statutory interpretation issue to which the lower court had limited itself, *see Evans*, 213 U.S. at 301, the Court avoided a direct ruling on the constitutionality of the statute. Nevertheless, it is apparent that the federal advisory opinion doctrine, discussed in *Evans*, would apply in any federal case today (*see infra* note 34 and accompanying text) were it necessary to face the constitutional advisory opinion issue in a federal case.

12 Act of March 3, 1901, ch. 854, § 935, 31 Stat. 1189, 1341, *quoted in Evans*, 213 U.S. at 299.

13 *United States v. Evans*, 30 App. D.C. 58, 62 (1907).

14 *Id.* at 61. The court wrote:

The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so impor-

implications of reading the statute to allow appeals in the face of a double jeopardy bar and concluded that the lower court's reading of the statute was a reading sustained by the federal advisory opinion doctrine.¹⁵

Evans thus exemplifies an important general point: if a prosecution appeal is seeking a remedy prohibited by double jeopardy law, then the case becomes one in which the appellate court would be rendering an advisory opinion on the underlying merits of the prosecution appeal.

tant to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically "moot" cases, where opposing views have not been presented.

Id. In fact, the reports of the case indicate that counsel appeared for the defendant in the D.C. Court of Appeals, but not in the Supreme Court. *See id.* at 60; *Evans*, 213 U.S. at 298. Whether the defendant was indigent or represented by retained counsel is not indicated, so it is unclear from the reports whether the absence of counsel in the Supreme Court resulted from a considered defense decision or a lack of an appointment of counsel. The idea that the defense side of the argument may go unrepresented (at least on the merits of the prosecutor's appeal) is further discussed below. *See infra* text accompanying notes 45–46.

15 *Evans*, 213 U.S. at 301. *See also United States v. Sanges*, 144 U.S. 310, 323 (1892), interpreting an early federal statute as not allowing government appeal and noting,

[i]n none of the provisions of this act, defining the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

Id.

The Supreme Court's "advisory opinion" terminology has been used throughout this Article for convenience. In contrast to the early American "advisory opinion" problem, which had to do with legislation, *see infra* note 45, courts (including the *Evans* Court) sometimes now use the term "advisory opinion" in a broader sense, applying it to a variety of nonjusticiability problems, including the one discussed in this Article. *See generally* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1, at 296 (1984). More particularly, the underlying nonjusticiability problem involved in this Article might be characterized as a mootness problem, with the acquittal preventing the appellate court from further affecting the relationship of the parties to each other.

Evans has been cited from time to time for various propositions,¹⁶ but the relationship between double jeopardy and advisory opinions so distinctly articulated in *Evans* has not been as clearly noted in recent cases, including the only Supreme Court decision involving the relationship of a double jeopardy problem and a state prosecution appeal.¹⁷ For reasons discussed below, *Evans*' precise conceptual basis for implicating double jeopardy becomes particularly informative and important when the prosecution is attempting to appeal in a state case.

III. STATUTORY BARS IMPLICATING DOUBLE JEOPARDY

Appeals are considered a creature of statute or, in some states, a creature of state constitutional law. As such, it is generally said that without express statutory authorization to appeal the prosecution enjoys no such right.¹⁸ Statutory language in a particular jurisdiction

16 Most of these citations relate to the general advisory opinion aspect of the case, to other discrete aspects of prosecution appeals, or to the role of appellate courts. For example, the case has been cited for the proposition that advisory opinions are not allowed in the proper exercise of a particular court's judicial power, *see, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 504 (1974) (concurring opinion cites *Evans* for proposition that the Court is powerless to render an advisory opinion); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (noting that "[t]his Court is without power to give advisory opinions"); or for the proposition that there are limitations on prosecutor appeal rights, *see, e.g.*, *United States v. Hastings*, 296 U.S. 188, 194 (1935) (citing *Evans* for the assertion that the Criminal Appeals Act of 1907 was enacted and government appeals subjected to prescribed limitations "in the light of considerations governing the exercise of the judicial power"); *United States v. Burroughs*, 289 U.S. 159, 162 n.5 (1933) (citing holding of D.C. Court of Appeals that the proviso was ineffective to affect the government's review of alleged errors in the course of a trial resulting in an acquittal); *State v. Muolo*, 172 A. 875, 876 (Conn. 1934) (noting that without any constitutional or statutory provision expressly conferring such power, the state's right to appeal in a criminal case is denied in the great majority of American jurisdictions); or for other miscellaneous propositions, *see, e.g.*, *Carroll v. United States*, 354 U.S. 394, 406, 407 n.21 (1957) (observing that the effect of the D.C. proviso involved in *Evans* "was to preclude entirely the taking of an appeal by the government after a verdict for the defendant" and noting that even when the government does have the right to appeal much of its appeal will be "swallowed up in the sanctity of the jury's verdict"); *State v. Keep*, 409 P.2d 321, 323 (Alaska 1965) (citing *Evans* to support interpretation that the state statute provides only limited instances in which the appeal of an acquittal is permissible, and noting that a verdict in favor of the defendant cannot be set aside).

17 *See Smalis v. Pennsylvania*, 476 U.S. 140 (1986), discussed *infra* in text accompanying notes 50-62.

18 The case most often cited for this proposition is *United States v. Sanges*, 144 U.S. 310 (1892). *See, e.g.*, *United States v. Wilson*, 420 U.S. 332, 336 (1975) (stating that "this Court early held that the Government could not take an appeal in a criminal

may itself make double jeopardy relevant by using it as a limiting proviso. This is the situation, for example, with regard to the present federal statute governing prosecutor appeals.

A. Federal Statutory Bar

The 1970 federal statute allows certain government appeals but makes those appeals expressly contingent on whether double jeopardy would preclude further proceedings:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, *except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.*¹⁹

case without express statutory authority"); *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981) (articulating rule as a "presumption" against prosecution appeals absent an express statute); *State v. Insley*, 606 So. 2d 600, 602 (Miss. 1992) (citing *Sanges* in connection with determination that state statute did not authorize appeal of the particular trial court action involved). While expressly interpreting the federal prosecution right to appeal, *Sanges* also extensively reviews the history of prosecution appeals, both in English law and in the early state cases. *Sanges* was a statutory interpretation case, with the Court subsequently stating that, "[n]o doubt of the power of Congress is intimated in [*Sanges*]." *Taylor v. United States*, 207 U.S. 120, 127 (1907).

The Supreme Court's insistence on a statutory basis for a federal prosecution appeal is consistent with Supreme Court case law requiring that other federal appeal rights be premised on positive law. The Court's dictum in *McKane v. Durston*, 153 U.S. 684, 688 (1894), asserting that a defendant has no federal due process right to appeal in a criminal case, has been relied upon in a long line of cases. *See, e.g.*, *Ross v. Moffit*, 417 U.S. 600, 606 (1974) (citing cases); *see also* *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954) (citing *McKane* to support conclusion that there is no constitutional right of appeal in civil cases and further stating that the right to review is not required by the Due Process Clause). Under this view, the states are not federally bound to provide a system of appellate court review. Of course, a state may provide a constitutional, as well as a statutory, right to a defense appeal or to a prosecution appeal. *See, e.g.*, WASH. CONST. art. I, § 22 ("In criminal prosecutions, the accused shall have . . . the right to appeal in all cases . . ."); TEX. CONST. art. 5, § 26 ("The state is entitled to appeal in criminal cases, as authorized by general law.").

19 18 U.S.C. § 3731 (1994) (emphasis added; irrelevant subsections omitted). This formulation has remained unchanged since it was passed by Congress in 1970 and signed by the President on January 2, 1971. *See* Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880 (1971). Amendments to other parts of § 3731 (unrelated to this article) were made in 1986 and 1994. *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 32, 100 Stat. 3592 (relating to appeal of certain release rulings); Title XXXII of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 322, § 330008(4), 108 Stat. 1796, 2142 (making typographical correction).

B. *The Background of the Present Statute*

The 1970 act was created against the background of earlier difficulties with the first Criminal Appeals Act, enacted in 1907.²⁰ It is tempting to presuppose that the present federal scheme—expressly precluding certain appeals when double jeopardy bars further prosecution—was the product of a deliberate legislative attempt to incorporate the tandem effect of the federal advisory opinion concept demonstrated by the *Evans* case. However, neither the history of the 1970 act nor of its 1907 predecessor establishes nonjusticiability as a paramount concern for the statutory inclusion of double jeopardy notions.

The relevant final language of the 1970 act was the product of a conference committee report that did not explain the change in substituting the ultimately enacted present proviso.²¹ An assumption that

The statute has been read as legislatively intended to expand prosecutor appeals to the fullest extent not prohibited by the double jeopardy boundary. See *United States v. Wilson*, 420 U.S. 332, 337 (1975) ("While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit."). Despite the contrary view articulated by Justice Stevens that this conclusion was not subjected to appropriate Supreme Court airing and that it does not accord with legislative history, see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 576–81 (1977) (concurring opinion), the *Wilson* view has prevailed. See, e.g., *United States v. Scott*, 437 U.S. 82, 85 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Jenkins*, 420 U.S. 358, 363 (1975).

20 Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246. The statutory problems are prominently exhibited, for example, in *United States v. Sisson*, 399 U.S. 267 (1970), and described in S. REP. NO. 91-1296 (1970) (Report of the Senate Judiciary Committee on S. 3132, involving the 1970 act's revision of the 1907 act). See also *Wilson*, 420 U.S. at 336–39 (1975).

Minor changes, not relevant here, were made subsequent to 1907 and before the revision in the 1970 act. See Act of May 24, 1949, ch. 139, § 58, 63 Stat. 89, 97; Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 237.

21 This final conference version, reconciling differences between the House and Senate versions of the bill, added the present proviso, "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution," in place of earlier and different limiting language that had been amended into the bill, but the significance of the changes is not addressed in the conference report or other legislative history. See H.R. CONF. REP. NO. 91-1768, at 10 (1970), reprinted in 1970 U.S.C.C.A.N. 5842, 5848 (accompanying H.R. 17825); see also 116 CONG. REC. 42196 (1970) (House floor presentation of conference result); 116 CONG. REC. 42039 (1970) (Senate floor presentation of conference result). The earlier language had allowed appeal of certain dismissals or terminations "except that no appeal shall lie from a judgment of acquittal." See S. REP. NO. 91-1296, at 1–2 (1970) (containing the earlier language of the Senate version that was ultimately deleted);

a legislative concern about advisory opinions consciously motivated the addition of the proviso is not supported by the silent conference committee report. Nor is it supported by the earlier Senate Judiciary Committee report which itself did not clearly focus on nonjusticiability problems.²² Moreover, such an assumption is questionable in light of the example provided by the confusing legislative history of the present statute's 1907 predecessor.

C. *The Criminal Appeals Act of 1907*

The 1907 Criminal Appeals Act²³ was the first government appeals statute and engendered debate among legislators at a time when double jeopardy law was considerably less developed than today. The legislative debate did grapple with some double jeopardy issues, but it dealt with justiciability issues only sparingly and unclearly. In fact, there is reason to believe that the legislative struggle with the 1907 statute's allusion to double jeopardy concepts may have resulted principally from a desire to underscore the notion that Congress was not somehow trying to sanction reprosecution of acquitted defendants.²⁴

116 CONG. REC. 35658 (1970) (Senate presentation of floor report). Senate language allowing appeals from an order "terminating a prosecution in favor of a defendant," *see id.*, was also deleted in the final conference version. *See* H.R. CONF. REP. NO. 91-1768, at 10 (1970), *reprinted in* 116 CONG. REC. 42036, 42039 (1970); 116 CONG. REC. 42039 (1970) (Senate floor presentation of conference result). The amendment to § 3731 was finally enacted as part of the extensive Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1880, 1890 (1971). More easily accessible summaries of the legislative history can be found in *United States v. Wilson*, 420 U.S. 332, 338-39 (1975), and in the concurring opinion in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 576-81 (1977) (Stevens, J., concurring), discussed in *supra* note 19.

22 *See* S. REP. NO. 91-1296, at 1-2 (1970).

23 Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246.

24 For years, proponents of government appeals had argued against reposing in one judge the unreviewable power to end a prosecution. Impetus to the argument for authorizing government appeals of some sort was delivered by means of a prominent district court ruling ending an antitrust prosecution. *See* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 113-19 (1928) (containing an account of the legislative history of the statute); Philip B. Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment of the Statute*, 28 U. CHI. L. REV. 419, 446-49 (1961) (citing various reports of the Attorneys General from 1892-1907); *United States v. Armour & Co.*, 142 F. 808 (N.D. Ill. 1906) (invalidating indictment and directing a verdict while jury was deliberating). As finally passed, the 1907 act essentially provided that the government could appeal from a decision dismissing an indictment or arresting judgment when the decision was based on "the invalidity, or construction of the statute upon which the indictment is founded." Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246. It also authorized appeals from a decision sustaining a special plea in bar if the defendant had not been put in jeopardy. On the

The possibility that the bill would result in moot appellate cases was only briefly touched upon in the Senate floor debates and then only in response to suggested changes.²⁵ Indeed, this legislative debate over the 1907 act was criticized for missing the import of the constitutional case-or-controversy requirement.²⁶

other hand, the 1907 statute expressly provided that the prosecution could not obtain a writ of error "in any case where there has been a verdict in favor of the defendant." *Id.*

Suggestions to amend the bill and varied interpretations were plentiful during its consideration. Some of the legislation's senatorial supporters asserted that its intent was to allow review of lower court decisions declaring statutes unconstitutional without infringing on defendants' rights. *See* 41 CONG. REC. 2190 (1907). A good deal of debate centered on various double jeopardy notions not related to mootness and with drafting attempts to deal with these concepts. *See id.* at 2190-97, 2744-63, 2818-25. Several senators saw the proposed legislation as open to allowing retrials following acquittals and as an impermissible intrusion on defendants' rights. *Id.* at 2190. The view was expressed that the idea of "jeopardy" was then difficult to define, *id.* at 2746, with the rare voice noting that it was impossible for Congress to constitutionally authorize that a defendant be placed twice in jeopardy. *Id.* at 2759. Some supporters of the bill argued that it should not be interpreted as allowing reindictment after jeopardy had attached, and they indicated that the jeopardy language was included from an abundance of caution, in order to guard against such an interpretation. *Id.* at 2191.

25 For example, when some proposed that the bill be framed in such a way that the defendant would have no further contact with the case, a few senators objected that this would result in a moot case beyond the jurisdiction of the federal courts. *See id.* at 2745, 2821.

Modeling his proposal on several state statutes, Senator Rayner unsuccessfully proposed that in certain cases the trial court judgment "shall not be reversed or in any manner affected, but the decision of the Supreme Court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may afterwards arise." *Id.* at 2745. Senator Nelson observed that this would make the case moot. *Id.* Senator Spooner argued that appeals following the grant of a motion in arrest of judgment would create a situation in which a question would be put to the Supreme Court, while constitutional jurisprudence prohibited such a ruling. *Id.* at 2821. The succeeding cloudy debate included some supposition that continuing a defendant's bail after a dismissal order would keep the case from becoming moot. *Id.* at 2822.

The issue of moot cases earned somewhat more dramatic attention in the House, given the position of Representative Jenkins who argued for a formulation that would allow the government to obtain a Supreme Court opinion on questions of law while freeing acquitted defendants. He asserted that "[i]t does not make any difference to me whether it is a moot case or not; the Department of Justice and the President of the United States have asked that the House bill become a law." *Id.* at 3046.

26 *See* Kurland, *supra* note 24, at 451 n.159 (asserting that "Congressional ignorance of the case or controversy requirement in the federal courts is demonstrated over and over again in this legislative history" of the Criminal Appeals Act of 1907).

D. *The Limiting Effect of the Present Federal Formulation*

It is important to see that the proviso language in the present federal statute is conceptually superfluous as a limiting device protecting against nonjusticiable appeals, whatever the congressional intent behind the double jeopardy limitation and however helpful the proviso may be in focusing the federal courts' attention on the double jeopardy segment of the problem. In light of the constitutional ban on federal court advisory opinions, the same appeal-barring result would obtain in federal courts whether or not the double jeopardy language appeared in the statute. Neither of the tandem constitutional doctrines involved can be overridden by statute.

E. *State Statutory Bars*

By the 1930s, a significant number of state legislatures had enacted statutes purporting to grant their prosecutors a right to appeal.²⁷ This development was well under way before the 1969 application of the federal Double Jeopardy Clause to the states and the present expansion of federal double jeopardy law in state cases.²⁸ As a result, some of these state statutes were expansively written without concern for present federal double jeopardy law concepts. Successor state statutes now allow for prosecution appeals in varying degrees and sometimes bear the influence of earlier unfettered language. However, just as the federal statute makes double jeopardy statutorily relevant to appealability, a number of states statutorily limit prosecution appeals by express reference to double jeopardy protection. The language in some of these statutes more accurately fits with

²⁷ See CODE OF CRIMINAL PROCEDURE 1208-11 (Official Draft 1930) (collecting statutes).

²⁸ See *Benton v. Maryland*, 395 U.S. 784 (1969). Coincidentally enough, *Benton* overruled *Palko v. Connecticut*, 302 U.S. 319 (1937), in which the Court had held that the general Due Process Clause, as distinguished from the Double Jeopardy Clause, did not bar re prosecution of a defendant for a greater crime of which he had been impliedly acquitted, following a successful prosecution appeal claiming trial error.

The change wrought by the application of the Double Jeopardy Clause to the states is dramatized by a comparison of the pre-incorporation literature, much of which now has been severely undercut by the change in constitutional law. Compare William H. Skelton, Comment, *State Appeals in Criminal Cases*, 32 TENN. L. REV. 449, 449 (1965) (noting that "most authorities agree that an appeal should be allowed from a verdict or judgment of acquittal") (footnote omitted), with Shellenberger & Strazzella, *supra* note 2, at 152-70 (collecting the long line of federal cases holding that acquittals are not subject to reversal and retrial).

the true appellate effect of prohibited second jeopardy.²⁹ Michigan, for example, allows certain prosecution appeals if the federal or state constitutional protection against double jeopardy "would not bar further proceedings against the defendant."³⁰ Other state statutes, however, somehow recognize the importance of double jeopardy as a limiting doctrine, but the exact relationship is not quite accurately reflected and the linguistic fit of the concepts is awkward, given that the double jeopardy protection does not directly apply to the appellate court proceeding.³¹

29 See MICH. COMP. LAWS ANN. § 770.12(1) (West Supp. 1997) (allowing prosecution appeal "if the protection against double jeopardy under . . . [the state and federal constitutions] would not bar further proceedings against the defendant"); MO. ANN. STAT. § 547.200(2) (West 1987) (amended by 1997 Mo. Legis. Serv. 132 (West)) (containing a residual authorization for prosecution appeals in all criminal cases beyond those specified elsewhere, "except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant"); N.C. GEN. STAT. § 15A-1445 (1988 & Supp. 1996) (granting prosecution an appeal from certain actions "[u]nless the rule against double jeopardy prohibits further prosecution"); see also ALASKA STAT. § 22.15.240 (Michie 1996) (generally providing that the "state's right of appeal in criminal cases is limited by the prohibition against double jeopardy contained in the" federal and state constitutions); COLO. REV. STAT. § 16-12-102 (Supp. 1996) (affording prosecution appeal but further stating that "[n]othing in this section shall authorize placing the defendant in jeopardy a second time for the same offense"); KY. REV. STAT. ANN. § 22A.020(4)(c) (Banks-Baldwin 1991) (providing that in cases where prosecution appeals are authorized, court may reverse and order new trial "in any case in which a new trial would not constitute double jeopardy").

30 MICH. COMP. LAWS ANN. § 770.12 (1) & (2) (West Supp. 1997).

31 See ME. REV. STAT. ANN. tit. 15, § 2115-A(2) (West 1964) (allowing certain prosecution appeals "when an appeal of the order would be permitted by the double jeopardy provisions" of the federal or state constitutions); WIS. STAT. ANN. § 974.05(1)(a) (West Supp. 1996) (providing for prosecution appeal "from any [f]inal order or judgment adverse to the state . . . if the appeal would not be prohibited by constitutional protections against double jeopardy").

A legislature's particular formulation of the statutory list of trial court actions from which the prosecution is permitted to appeal can itself avoid (or minimize) the need to address concerns about second jeopardy problems because the formulation can be limited to trial court actions that are unlikely to present any jeopardy problem. For example, a jurisdiction may limit appeals, in whole or in part, to pre-jeopardy actions or to post-verdict actions (such as the suppression of evidence, the grant of a new trial, or some sentencing issue). See, e.g., MONT. CODE ANN. § 46-20-103 (1995); TEX. CODE CRIM. P. ANN. art. 44.01(a) (West Supp. 1997); see also MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(3)(ii) (1995) (providing generally that state appeal "shall be made before jeopardy attaches to the defendant"). Some prosecution appeal statutes avoid at least one class of double jeopardy problems by expressly providing that the prosecution cannot appeal from a verdict of acquittal. See, e.g., ILL. CONST. art. VI, § 6 (guaranteeing in general an appeal of right "except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of

On the other hand, some state statutory language seems to call for advisory opinions in cases that have become moot by virtue of double jeopardy bars. The invitation is sometimes overt.³² In other statutes the invitation is implicit because the statutes sweepingly authorize prosecution appeals or specifically authorize appeal even in situations in which federal double jeopardy law now clearly prohibits further trial court prosecution.³³ All the statutes which seemingly al-

acquittal"); LA. CODE CRIM. PROC. ANN. art. 912(B) (West 1996) (providing that "state cannot appeal from verdict of acquittal").

32 Kentucky, Mississippi, Nebraska, and Wyoming provide examples. In Kentucky, the state's constitutional provision allows prosecution appeal "except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law . . ." KY. CONST. § 115. Statutory law further provides that in cases in which prosecution appeals are authorized, the court may reverse and order a new trial "in any case in which a new trial would not constitute double jeopardy." KY. REV. STAT. ANN. § 22A.020(4)(c) (Banks-Baldwin 1991). This bundle of Kentucky law is interpreted in *Commonwealth v. Littrell*, 677 S.W.2d 881 (Ky. 1984), and *Thompson v. Commonwealth*, 652 S.W.2d 78 (Ky. 1983) (rendering opinion on claimed trial judge error raised by prosecution's certification following defendant's trial acquittal). (*Thompson's* conclusion on a point not implicating the certification procedure was overruled in *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1989).) MISS. CODE ANN. § 99-35-103(b) (1994) provides that the prosecution may appeal a judgment acquitting the defendant when a question of law has been decided adversely to the state, but the appeal shall not subject the defendant to further prosecution nor reverse the judgment of acquittal. NEB. REV. STAT. § 29-2319 (1995) provides as to some prosecution-initiated reviews that the judgment of the trial court shall not be reversed or affected, but the decision of the reviewing district court "shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may thereafter arise in the district." In affording the prosecution a possible review under a discretionary bill of exceptions following an acquittal, while precluding a remedy in the case, WYO. STAT. ANN. § 7-12-104(b) (Michie 1997), Wyoming also offers a prime example of an advisory opinion system. The Wyoming situation is discussed more extensively *infra* text accompanying notes 40-43.

33 See COLO. REV. STAT. ANN. § 16-12-102(1) (West Supp. 1996) (stating that prosecution may appeal any trial court decision upon any question of law but expressly disclaiming authorization for placing defendant in second jeopardy); CONN. GEN. STAT. ANN. § 54-96 (West 1996) (authorizing state appeals from a ruling of law "arising on the trial of criminal cases . . . in the same manner and to the same effect as if made by the accused," if permitted by presiding judge); IND. CODE § 35-38-4-2(4) (Michie 1994) (affording prosecution appeal "[u]pon a question reserved by the state, if the defendant is acquitted"); IOWA CODE ANN. § 814.5(2)(d) (West 1994) (authorizing a discretionary appeal from a "final judgment or order raising a question of law important to the judiciary and the profession"); NEV. REV. STAT. ANN. § 177.015(1)(b) (Michie 1995) (purporting to allow prosecution to appeal grant of a motion to acquit); OKLA. STAT. ANN. tit. 22, § 1053(3) (West Supp. 1997) (allowing a prosecution appeal "[u]pon a question reserved by the state"). For examples of cases arising under these statutes, see *infra* note 40.

low advisory opinions in the face of a double jeopardy bar against further prosecution graphically illustrate the importance of sorting out the precise relationship of double jeopardy to prosecution appeals.

IV. THE CONSTITUTIONALITY OF ALLOWING STATE APPEALS DESPITE A DOUBLE JEOPARDY BAR TO FURTHER PROSECUTION

Those state statutes allowing a prosecution appeal despite a double jeopardy bar to further trial court proceedings present several distinct questions. There is, first of all, a state law issue concerning whether any given statute conflicts with a state's own constitution—a purely state law question open to different answers from state to state.

The separate question is whether such statutes inherently violate the federal constitution—a federal question and one with a present answer. For federal courts, the Supreme Court of the United States long ago decided that rendering an advisory opinion is not a valid exercise of the federal judicial power.³⁴ State courts, however, are not confined by the federal courts' rigid Article III "case or controversy" requirement. In a state case, the question of whether federal double jeopardy *would prohibit a remedy* to the prosecution is itself a matter of federal constitutional law,³⁵ but the separate question of whether the state court can render an advisory opinion is a question of only state law concerning the functioning of that state's courts.³⁶

34 See, e.g., *Local No. 8-6 Oil Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960); *United States v. Evans*, 213 U.S. 297, 301 (1909) (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), and *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)). The federal advisory opinion doctrine is considered an aspect of the constitutional power of the federal courts, which is limited to deciding cases or controversies. See, e.g., *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (containing an extensive collection of related principles and cases). In the federal system, to avoid becoming moot a case must remain an actual controversy at each stage of review. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997) (involving a civil case that became moot the day before the appeal was filed).

35 See *Benton v. Maryland*, 395 U.S. 784 (1969) (holding that the states must abide by federal Double Jeopardy Clause). Under the Supremacy Clause, the state courts must provide at least a minimum federal double jeopardy protection. See U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.").

36 See, e.g., *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (pointing out that "the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts" and concluding that the "States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or determine matters that would not satisfy the more stringent requirement in the federal court that an actual 'case' or 'controversy' be presented for resolution"); *Secretary of State v. Jo-*

As do the federal courts, a majority of state courts generally decline to issue advisory opinions as a matter of state law, or at least express a reluctance to issue them.³⁷ This aversion to advisory opin-

seph H. Munson Co., 467 U.S. 947, 971 (1984) (Stevens, J., concurring) (observing that “[n]othing in Art. III of the Federal Constitution prevents the [state appellate court] from rendering an advisory opinion concerning the constitutionality of [state] legislation if it considers it appropriate to do so”); *see also* Arizona v. Manypenny, 451 U.S. 232 (1981), stating broadly,

The decision to limit or extend a State’s appellate authority is a matter of state law within constitutional constraints. If a state wishes to empower its prosecutors to pursue a criminal appeal under certain conditions, it is free to so provide, limited only by guarantees afforded the criminal defendant under the Constitution.

Id. at 249. *See also* *Evans*, 213 U.S. at 300, which itself noted that, unlike federal courts, some state courts are required to give answers to questions put to them by state legislatures or executives. On the particular type of advisory opinion mentioned in *Evans*, *see infra* note 45.

Some scholars have unsuccessfully urged a limited federal exception to the states’ freedom to give advisory opinions, arguing that when the underlying issue with which the advisory opinion will concern itself is a federal issue, state justiciability doctrines should be narrowed in certain ways and made to conform to the federal case-or-controversy doctrine. *See* William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 263–64, 265 n.7 (1990) (collecting authorities while acknowledging that the long-held Supreme Court view is to the contrary). In the situation discussed in the present Article, the underlying claim(s) presented by the prosecution appeal might turn on federal constitutional law or might well be confined to state law issues.

³⁷ *See, e.g.*, *Armory Park Neighborhood Ass’n v. Episcopal Community Services*, 712 P.2d 914, 919 (Ariz. 1985) (stating that Arizona courts do not issue advisory opinions as a matter of restraint, even in the absence of a state constitutional mandate); *Board of Trustees of the Employees’ Retirement Sys. v. Kenworthy*, 322 S.E.2d 720, 723 (Ga. 1984) (stating that the court “has in the past generally refused to issue advisory opinions”); *Mahiai v. Suwa*, 742 P.2d 359, 364 (Haw. 1987) (indicating that courts are to avoid advisory opinions on abstract questions of law); *St. Charles Gaming Co. v. Riverboat Gaming Comm’n*, 648 So. 2d 1310, 1315 (La. 1995) (stating, in the context of a civil penalties case, that courts will not decide moot controversies or render advisory opinions with respect to such controversies); *Webb v. Joyce Real Estate*, 672 A.2d 660, 665 (Md. Ct. Spec. App. 1996) (“We may not render advisory opinions.”); *In re Workmen’s Compensation Fund*, 119 N.E. 1027, 1028 (N.Y. 1918) (stating that courts do not give advisory opinions); *Siders v. Reynoldsburg Sch. Dist.*, 650 N.E.2d 150, 163 (Ohio 1994) (announcing that “this court does not have the constitutional or statutory authorization to issue advisory opinions”); *Brown v. Oregon State Bar*, 648 P.2d 1289, 1292 (Or. 1982) (declaring that “in the absence of constitutional authority, the court cannot render advisory opinions”); *Sotelo v. State*, 931 S.W.2d 745, 746 n.3 (Tex. Ct. App. 1996, n.w.h.) (noting that the “courts of appeals and the Court of Criminal Appeals are without authority to issue advisory opinions”); *State v. Musselman*, 667 P.2d 1061, 1065 (Utah 1983) (stating that an advisory opinion on appeal from acquittal is beyond the court’s power).

ions is not universal, however. Sometimes expressly and sometimes by implication, a number of state appellate courts have indicated a willingness to render advisory opinions in cases arising from the lower courts.³⁸ Moreover, some courts generally prohibiting advisory opinions declare an exception in unusual circumstances.³⁹ This formula-

38 See, e.g., *State v. Johnson*, 931 S.W.2d 760, 763 (Ark. 1996) (declaring trial court error on prosecution appeal while acknowledging that double jeopardy rights prevent retrial); *State v. Bailey*, 523 A.2d 535, 538 (Del. 1987) (implying that under a particular statute allowing appeal by leave of supreme court, prosecutor could appeal without prejudice to post-verdict acquittal); *State v. Huggins*, 665 P.2d 1053, 1054 (Idaho 1983) (although double jeopardy barred retrial following state appeal, court nevertheless renders ruling recognizing that “[i]n a sense, our opinion today is advisory”); *State v. McKissack*, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993) (stating that “[w]hen a defendant has been acquitted and the State appeals a reserved question of law, only questions of law are considered by this court, as a way to furnish guidance to trial courts in future cases”); *In re R.G.M.*, 575 P.2d 645, 646 (Okla. Crim. App. 1978) (stating that an appeal by prosecution on a reserved question of law may “be taken from an acquittal of the defendant or from an order of the court authorized by law which expressly bars further prosecution”); see also cases cited *infra* notes 40, 43. State cases sometimes contain broad disclaimers against advisory opinions in other contexts but courts nevertheless issue them under the narrower circumstances of the statutes discussed in this Article. E.g., compare *State v. McCormick*, 523 N.W.2d 697, 698 (Neb. 1994) (noting generally that the court does not issue advisory opinions), with *State v. Wilen*, 539 N.W.2d 650 (Neb. Ct. App. 1995) (finding error on statutory appeal in directed verdict and noting that double jeopardy bars retrial).

39 See, e.g., *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985) (discussing public interest exception to mootness doctrine that normally precludes advisory opinions); *Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 352–53 (Pa. Super. Ct. 1996) (stating that court will not issue advisory opinions or review moot or abstract questions, but noting that exceptions to the moot question doctrine exist, inter alia, when the question is capable of repetition and apt to elude appellate review or in the rare case when an appeal concerns questions of great public importance); *State v. Montgomery*, 929 S.W.2d 409, 414 (Tenn. Crim. App. 1996) (declaring that Tennessee “recognizes two exceptions to the mootness doctrine,” one dealing with an error capable of repetition but which may evade appellate review and another if the issue is of great public interest and is important to the administration of justice); *In re M.C.*, 915 S.W.2d 118, 119 (Tex. Ct. App. 1996, n.w.h.) (declaring that the court’s role does not include delivering advisory opinions in cases that are moot but noting an exception for issues capable of repetition but evading review); see also IOWA CODE ANN. § 814.5(2)(d) (West 1994) (authorizing a discretionary appeal from a “final judgment and order raising a question of law important to the judiciary and the profession”), interpreted in *State v. Kase*, 339 N.W.2d 157, 158 (Iowa 1983) (stating that a moot appeal will be heard even though acquittal was entered because the issue involved a question of public importance that was likely to recur and was in need of authoritative interpretation), and *State v. Allen*, 304 N.W.2d 203, 207 (Iowa 1981) (finding that defendant who was convicted of lesser included offense could not again be put in jeopardy for greater offense but then finding error in trial court’s ruling); KAN. STAT. ANN. § 22-3602(b)(3) (1995) (allowing state appeal on questions reserved following final judg-

tion might allow room for prosecutors to argue that an important and recurring trial level concern, which may well normally lead to acquittals, needs appellate resolution limited to prospective cases even if double jeopardy law prevents application of the solution to the instant case.

Many of the statutes clearly allowing prosecution appeals in moot cases have been regular vehicles for prosecution appeals.⁴⁰ Wyoming represents a leading example of such a legislative authorization for review of prosecution-raised issues in situations in which double jeopardy law would preclude further prosecution, combined with judicial compliance with the authorizing statute, thereby producing advisory rulings limited to future cases. The Wyoming statutory scheme af-

ment), *interpreted in* *State v. Crozier*, 587 P.2d 331, 335-36 (Kan. 1978) (demonstrating that the question must be one sufficient to aid in correct and uniform administration of criminal law).

40 For examples of cases arising under the statutes cited in *supra* notes 32-33, *see* *People v. Gonzales*, 666 P.2d 123 (Colo. 1983) (finding that prosecution's statutory appeal of directed acquittal involved a question of law meeting applicable standards regarding future clarity of law and disapproving of judgment while acknowledging that double jeopardy prevented reprosecution); *State v. Allen*, 304 N.W.2d 203, 207 (Iowa 1981) (concluding that a defendant who was convicted of a lesser included offense could not again be put in jeopardy for the greater offense but finding error in trial court's ruling); *State v. McKissack*, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993) (stating that "only questions of law are considered . . . as a way to furnish guidance to trial courts in future cases," even though acquittal bars further prosecution of defendant); *State v. Wilen*, 539 N.W.2d 650 (Neb. Ct. App. 1995) (finding error in directed verdict while noting that double jeopardy bars retrial); *State v. Young*, 874 P.2d 57, 58 (Okla. Crim. App. 1994) (finding trial court error while concluding that the trial court action barred further prosecution). The Mississippi statute, Miss. CODE ANN. § 99-35-103(b) (1994), has been read to distinguish between pure issues of law (appealable) and other issues involving fact. *See, e.g., State v. Insley*, 606 So. 2d 600, 602 (Miss. 1992) (collecting cases that hold that the statute does not authorize prosecution appeals of insufficiency of evidence issues); *State v. Thornhill*, 171 So. 2d 308, 312 (Miss. 1965) (finding defendant's acquittal barred reprosecution but still considering prosecution's claim of trial error regarding admission of evidence).

Conversely, the Nevada statute, *see* NEV. REV. STAT. ANN. § 177.015(1)(b) (Michie 1995), was held unconstitutional in *State v. Viers*, 469 P.2d 53, 54 (Nev. 1970), which decided that legislative attempt to have court decide moot questions following an acquittal was beyond the constitutional power granted to the court. Considering a prosecution attempt to appeal under the Connecticut statute, *see* CONN. GEN. STAT. ANN. § 54-96 (West 1996), the state supreme court concluded that the contested trial court action was an acquittal and therefore "double jeopardy bars [the court] from considering the state's claim . . ." *State v. Paoella*, 554 A.2d 702, 711 (Conn. 1989). The court made no reference to the tandem principle that moot cases producing advisory opinions will not be decided, an established proposition evident in other Connecticut opinions. *See, e.g., Carothers v. Capozziello*, 574 A.2d 1268, 1285 (Conn. 1990) (citing earlier case law).

fords the prosecution a limited possibility of review by means of a bill of exceptions,⁴¹ and further calls for advisory opinions by mandating that the appellate court's decision:

shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterwards arise in the state, but shall not reverse nor in any manner affect the judgment of the court in the case in which the bill of exceptions was taken.⁴²

The statute has played a part in a number of Wyoming cases deciding the extent of prosecutorial rights in the context of advisory opinions.⁴³

Once there has been the requisite final decision that double jeopardy bars further trial court prosecution, none of the state advisory opinion schemes appear to place any notable burden on a defendant to participate. Because this point is obscured in some cases, this ob-

41 WYO. STAT. ANN. §§ 7-12-101 to 104 (Michie 1997). For discussions of some aspects of Wyoming appeal mechanisms, see generally Gerald M. Gallivan, *Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint*, 20 LAND & WATER L. REV. 159 (1985); Bradley Scott McKim, Case Note, 20 LAND & WATER L. REV. 723 (1985).

42 WYO. STAT. ANN. § 7-12-104(b) (Michie 1997).

43 See, e.g., *Crozier v. State*, 882 P.2d 1230 (Wyo. 1994) (holding that Wyoming statutes do not allow prosecution review by different mechanism of cross appeal); *State v. Keffer*, 860 P.2d 1118 (Wyo. 1993) (finding error in trial court's refusal to give prosecution-requested lesser included offense instruction while noting its decision could not affect jury acquittal); *State v. Stahl*, 838 P.2d 1193 (Wyo. 1992) (following dismissal of criminal complaint, court determined authority of officer to arrest); *State ex rel. Gibson v. Cornwell*, 85 P. 977 (Wyo. 1906) (refusing to take jurisdiction over bill of exceptions that was not properly sealed as required by statute).

In other contexts, the Wyoming Supreme Court has sometimes declared an intolerance for advisory questions. See, e.g., *Evans v. State*, 653 P.2d 308, 311 (Wyo. 1982) ("We do not render advisory opinions."). At other times, the Wyoming Supreme Court has expressed more flexibility about rendering them. See, e.g., *Enberg v. State*, 874 P.2d 890, 891-92 (Wyo. 1994) (supplying opinion sought by defendant and prosecution, after stating that "[i]t is a fundamental rule of appellate practice that advisory opinions are rarely given" although there is some support for issuing them). The state constitutionality of advisory opinions is not generally discussed in the Wyoming cases involving a prosecutor's statutory bill of exceptions, but the cases often underscore the statutory requirement that the court's present ruling will not affect the defendant's own judgment. See, e.g., *Keffer*, 860 P.2d at 1124; *Stahl*, 838 P.2d at 1194 (stating that court's "objective is to determine the law which will govern all similar pending and future cases" but that it may not reverse or in any way affect the judgment); see also *State v. Faltynowicz*, 660 P.2d 368, 372-75 (Wyo. 1983) (concurring opinion) (discussing constitutional provision and prosecution appeal rights in light of double jeopardy protection).

servation deserves some further clarification about when the case actually becomes moot.

A. *The Timing in Moot Prosecution Appeals*

Once it has been finally decided that a defendant cannot be subjected to the prohibited second jeopardy, obviously the defendant is no longer in any danger for the same offense. No longer having a stake in the underlying claim involved in the appeal, the defendant cannot be forced to further participate in the appeal.⁴⁴ Such a defendant cannot be conscripted any more than could any bystander be conscripted to participate. Yet, even without that party's participation, some states might well choose to reach the underlying merits of the prosecution's claim in an advisory opinion of this type.⁴⁵ In such an appeal the defense position on the merits of the underlying prosecutorial claim might go wholly or partially unexposed by an advocate's presentation. This is one of the possible dangers with any moot appeal. It is not, however, necessarily true that the defense side

44 See *supra* note 14.

45 The particular type of advisory opinion involved in this Article arises on an underlying prosecutorial claim of trial court error asserted to have occurred during what was originally a live case or controversy, one with a concrete set of facts. However, the case then becomes a moot controversy between the parties at the point when it is finally discerned that the double jeopardy bar operates. The power of a court to render an advisory opinion in the context of a case in which the issue is no longer justiciable should be distinguished from the power (or requirement) that a court may (or must) give advisory answers to questions posed by other coordinate branches of government, a type of advisory opinion mentioned in *United States v. Evans*, 213 U.S. 297 (1909). Some state constitutions (or even statutes) call for this latter type of advisory opinion. See, e.g., ALA. CODE § 12-2-10 (1995); COLO. CONST. art. VI, § 3; DEL. CODE ANN. tit. 10, § 141 (1995); FLA. CONST. art. IV, § 1(c); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. LXXIV; R.I. CONST. art. X, § 3; S.D. CONST. art. 8, § 5; see also *In re Advisory Opinion*, 335 S.E.2d 890 (N.C. 1985) (acknowledging prior practice of individual judges issuing advisory opinions upon request of various government bodies but noting that such single judge opinions are not binding); Fletcher, *supra* note 36, at 272.

The advisory opinion [historically] found in state court practices . . . was what one might call a true advisory opinion—the answer to a legal question formally posed by a coordinate branch of government. The advisory opinion that has become an issue in the twentieth century is different. This new form of advisory opinion is not given in response to a formal request by a coordinate branch of government; rather, it is an opinion rendered in a litigated dispute in which a party is thought not to have a sufficient, or sufficiently immediate, stake in the matter being litigated to make the court's decision anything but advisory.

of the underlying appeal claim will go unargued. Not only is it possible for most courts to appoint *amicus curiae* or to otherwise appoint an attorney or attorney-organization to represent the defense position, but this is what happens in practice in some states which allow appeal when the case is moot because the defendant involved in the particular case cannot be reprosecuted.⁴⁶

In situations contemplated by many prosecution appeals, the preliminary jurisdictional issue is whether a double jeopardy bar to further prosecution actually does exist, for example, whether there is the functional equivalent of an acquittal. Until the double jeopardy point is finally resolved in the defendant's favor (with all levels of prosecution appeal exhausted), the defendant actually does maintain a stake in the appellate proceedings. For example, until the appellate courts finally rule on an appellate court motion to dismiss (based on double jeopardy concerns) the defendant must assert that double jeopardy law mandates protection from further trial court prosecution. Of course, that ruling is not always a foregone conclusion in a prosecution appeal from the trial court decision.⁴⁷ The same is true with regard to further possible prosecution appeals to a higher court following an intermediate appellate court double jeopardy ruling that was favorable to the defendant.⁴⁸

Put another way, these potentially moot appeals involve a first step asking whether double jeopardy bars further trial court proceedings (and thus bars the appeals court from granting a remedy). The defendant maintains an interest in this initially live controversy, which involves the application of double jeopardy law to the defendant's case, until that double jeopardy claim is finally resolved in the defendant's favor. A second question involves the merits of the prosecutor's claim of error, asserted to have occurred in the trial court. The defendant may or may not have a stake in this underlying claim, depend-

46 See, e.g., WYO. STAT. ANN. § 7-12-103 (Michie 1997) (providing that if the prosecution is granted bill of exceptions, the trial judge shall "appoint a competent attorney to argue the case against the state" and shall fix a reasonable fee to be paid by the prosecuting county); *Keffer*, 860 P.2d at 1121 (state public defender appeared for defense).

47 See, e.g., *United States v. Scott*, 437 U.S. 82 (1978) (limiting prior case law and rejecting defendant's argument that prosecution appeal was barred because double jeopardy law prevented further proceedings).

48 See, e.g., *id.* at 82 (appealing from an intermediate appellate court where the defense successfully argued the double jeopardy issue in connection with prosecution appeal, the prosecution thereafter successfully sought further review of that double jeopardy issue in a higher appellate court, in which defense counsel appeared); *Commonwealth v. Smalis, sub nom. Commonwealth v. Zoller*, 490 A.2d 394 (Pa. 1985) (same), *rev'd sub nom. Smalis v. Pennsylvania*, 476 U.S. 140 (1986).

ing on whether the double jeopardy claim has been finally resolved in the defendant's favor.⁴⁹

B. Smalis

A 1986 Supreme Court case, *Smalis v. Pennsylvania*,⁵⁰ highlights the need for making the distinctions discussed above. The actual focus of the *Smalis* case was the Double Jeopardy Clause's effect on the grant of a mid-trial demurrer. The highest state court permitted a prosecution appeal from a trial judge's grant of a defense demurrer to the prosecution's case in a nonjury trial. In doing so, the state supreme court found that a reversal would create no double jeopardy problem to further trial court prosecution and it remanded to the state intermediate appellate court to consider the merits of the prosecutor's underlying claim of trial court error.⁵¹ The intermediate court had come to the opposite conclusion on the double jeopardy issue and had dismissed the prosecution appeal.⁵² The Supreme Court of the United States concluded that double jeopardy principles would indeed bar further prosecution, a predictable conclusion in light of

49 In sum, the appropriate analysis suggests a sequence of questions for state courts when considering dismissal of prosecution appeals for lack of jurisdiction arising from double jeopardy protection. Preliminarily, as in all appeals, a court should determine whether there is statutory language conferring appellate jurisdiction for the underlying prosecutorial claim. If the prosecutor's appeal appears to be allowed by the statute, in those states where statutory language does not expressly condition appeal on a lack of double jeopardy bar, a further two-step analysis is in order. The first step is to analyze whether legal principles (including federal or state double jeopardy principles) preclude applying against the defendant the remedy being sought by the prosecutor. If the remedy is precluded, the case is moot and the court must further consider a second step: whether the jurisdiction is one in which advisory opinions are permitted under the circumstances. A negative answer to this question would call for dismissal of the appeal; an affirmative answer would normally lead to appellate consideration of the merits of the prosecutor's underlying claim.

In jurisdictions where statutory language itself bars appeal due to double jeopardy protection (*see, e.g., supra* note 31 and accompanying text) the inquiry about advisory opinions is unnecessary. Instead, the double jeopardy inquiry becomes part of the preliminary inquiry about the court's appellate jurisdiction as formulated by the statute.

50 476 U.S. 140 (1986).

51 The underlying claim was whether the trial judge erred in finding the evidence was not sufficient to withstand the demurrer motion. *See* Commonwealth v. Smalis, *sub nom.* Commonwealth v. Zoller, 490 A.2d at 394 (remanding to the superior court to determine if the demurrer was properly granted). *Zoller* was a companion case consolidated for state appeal; only the defendants in *Smalis* reached the U.S. Supreme Court, and the facts of *Zoller* are not important for purposes of this Article.

52 Commonwealth v. Smalis, 480 A.2d 1046 (Pa. Super. Ct. 1984).

the existing content of double jeopardy law unless the Supreme Court's then-recent cases were to be overruled or modified.⁵³ The United States Supreme Court's critical resolution was to treat the demurrer ruling as a double jeopardy bar to further trial court prosecution. However, it is not this double jeopardy determination which is important here. Rather, what is of interest is the Supreme Court's further language as it grappled with the connection between the double jeopardy bar and the prosecution appeal. The Court's language calls for further reflection and possible future adjustment.

Smalis ventured into new territory in the sense that it was the first Supreme Court case to confront a double jeopardy bar to a state prosecutor's prosecution appeal of an underlying issue.⁵⁴ Although not expressly recognized as such, a novel point inherent in *Smalis* was what the appropriate Supreme Court disposition should be in a case involving a state prosecution appeal in a *state* appellate court when the U.S. Supreme Court has decided that double jeopardy precludes further prosecution, thereby raising a mootness issue as to the underlying claims on the merits. As will be seen, a focus on the exact role of double jeopardy in prosecution appeals would assist in reaching a clear resolution of this issue. An expectable Supreme Court disposition might have been the reversal of the judgment of the state's high-

53 See James A. Strazzella, *Double Jeopardy*, 4 PA. L. J. 11 (No. 39, 1981) (arguing that the Pennsylvania grant of demurrer acted as an acquittal under U.S. Supreme Court double jeopardy case law defining an acquittal and that state law was in conflict in allowing further prosecution).

54 Most Supreme Court double jeopardy cases subsequent to the 1969 due process incorporation of the Double Jeopardy Clause dealt either with defendants' appeals or federal prosecution appeals. Of the few additional state prosecution appeals decided by the Court and involving double jeopardy issues in any form, only *Smalis* involved double jeopardy as a bar to reaching an underlying prosecution appeal claim. The few other state prosecution appeal cases involved a contested trial court dismissal ruling, based on double jeopardy grounds; these cases did not entail the question of double jeopardy as injecting a bar to consideration of another claim. See *Ohio v. Johnson*, 467 U.S. 493 (1984) (involving prosecution appeal of validity of trial judge's dismissal, on double jeopardy grounds, of remaining counts after defendant pled guilty to lesser crimes over prosecutor's objection); *Tibbs v. Florida*, 457 U.S. 31 (1982) (involving prosecution appeal of trial judge's pretrial dismissal, dependent on effect of earlier appellate court ruling concerning weight of evidence in the first trial); *Illinois v. Vitale*, 447 U.S. 410 (1980) (involving state appeal of trial court's pretrial dismissal of indictment on double jeopardy grounds). The hybrid case of *Arizona v. Manypenny*, 451 U.S. 232 (1981), involved a state prosecution removed to federal court and dealt with a statutory interpretation issue: whether the state prosecutor was authorized to appeal in such a situation. The Court noted it was not deciding whether the appeal would be barred through the Double Jeopardy Clause, a question not decided by the lower court and one not raised by the parties in the Supreme Court. *Id.* at 238 n.12.

est court with a ruling that the defendant could not be subjected to further "jeopardy," accompanied by a remand for appropriate further state appellate court action in light of that federal determination. This would allow the state court to dispose of the state prosecutor's appeal in light of the state's own doctrine concerning advisory opinions.

The Supreme Court's ultimate judgment, in fact, was that "[t]he judgment of the Pennsylvania Supreme Court is *Reversed*,"⁵⁵ but the opinion's language goes beyond this disposition. *Smalis* declared that the state intermediate appellate court had correctly held that the Double Jeopardy Clause bars a postacquittal "appeal" by the prosecution not only when it might result in a second trial but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged."⁵⁶ The opinion's statement that the Double Jeopardy Clause bars a postacquittal "appeal" reflects existing law concerning appellate proceedings only if not read literally and if read as a telescoped statement involving the circumstances of *Smalis*. For example, it is accurate under existing Supreme Court law only if read in light of the statement's focus on the intermediate appellate court ruling in a state whose courts avoid advisory opinions⁵⁷ and if the language is read to mean double jeopardy thereby *indirectly* bars the appeal as a matter of state law.

Additional problematic language appears in the *Smalis* Court's opinion: "When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him."⁵⁸ It is difficult to conceive of an actual situation covered by this language. If the case is one in which an appellate court has finally found an acquittal barring further prosecution under the Double Jeopardy Clause, there can be no successful prosecution appeal that would lead to proceedings that violate the Double

55 *Smalis*, 476 U.S. at 146.

56 *Id.* at 145, 146 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)).

57 *See, e.g.*, *Commonwealth v. Jubelirer*, 614 A.2d 204, 212-13 (Pa. 1992) (holding that the court "will not break with long tradition of refusing to give advisory opinions"); *Mt. Lebanon v. County Bd. of Elections*, 368 A.2d 648 (Pa. 1977); *Pennsylvania Pub. Util. Comm'n v. County of Allegheny*, 203 A.2d 544 (Pa. 1964); *Schoenbrun v. Nettour*, 61 A.2d 868, 869 (Pa. 1948); *Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 352 (Pa. Super. Ct. 1996).

58 *Smalis*, 476 U.S. at 145.

Jeopardy Clause. Further jeopardy is barred and the appeal is moot as to the defendant, whether or not an advisory opinion is issued. If a defendant who had received a final favorable double jeopardy ruling were forced to further participate in an appeal for which there was no proper purpose, there might well be a constitutional problem (perhaps a due process problem), but no realistic sequence presents such a situation. Conversely, until a final decision on the bar is reached, the appeal is live and does serve a proper purpose in resolving that controversy. Thus the *Smalis* language—that “[w]hen a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose”—describes no realistic situation. Furthermore, the language describes a situation not presented in *Smalis*. The *Smalis* issue was whether the demurrer ruling *did* constitute a double jeopardy bar, not whether the defendant could be further prosecuted despite a legitimate double jeopardy claim or whether there could be a state appeal if double jeopardy barred further prosecution.

In still further complicating language, the Court continued: “We hold, therefore, that the trial judge’s granting of [defendants’] demurrer was an acquittal under the Double Jeopardy Clause, *and that the Commonwealth’s appeal was barred* because reversal would have led to further trial proceedings.”⁵⁹ Here, too, the language does not reflect a realistic possibility. Until the double jeopardy claim was finally resolved (in this case, by the United States Supreme Court) there was no recognized bar to appeal, indirect or otherwise. Conversely, after such resolution there was no possibility that “reversal would have led to further trial proceedings.” The litigants did not argue otherwise. Nor does the language otherwise reflect existing federal principles in suggesting a *bar to appeal* on double jeopardy grounds. In essence, whether the appeal is barred is a state question.

The *Smalis* language should therefore be read in context. None of the briefs filed in the Supreme Court found it necessary to focus on the exact relationship of double jeopardy to a state prosecution appeal and on the consequences of that relationship, nor did any of the lower court opinions.⁶⁰

59 *Smalis*, 476 U.S. at 146 (emphasis added).

60 The briefs in the U.S. Supreme Court did, however, address the jurisdictional argument concerning whether the posture of the case deprived the Court of its statutory appellate jurisdiction because the case, arguably, did not yet possess the requisite “finality” required for Supreme Court review, but this is a separate issue. The Court concluded that the case had the requisite finality. *See Smalis*, 476 U.S. at 143 n.4. The Supreme Court’s jurisdiction had been asserted under a statute allowing review only of state court “final” judgments or decrees. 28 U.S.C. § 1257(3) (1982) (stating the

Perhaps the Court's language—that the prosecution “appeal was barred because reversal would have led to further trial proceedings”—was a result of the Court's more familiar and routine practice in federal prosecution appeals: in federal cases, the federal statute itself bars the appeal and makes dismissal of the appeal the appropriate federal remedy. Moreover, as noted, the language is understandable if seen as only verifying the lower intermediate appellate court's conclusion under a combination of federal law (double jeopardy) and state law (no advisory opinions in Pennsylvania). In this reading, perhaps the language is a shorthand formulation, telescoping the result of a pattern that is common in most states, where the double jeopardy bar *indirectly* leads to dismissal of the appeal.

Standing alone, the *Smalis* statement—that “[a]llowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him”—does not measure up to prior law and is particularly troubling if it was indeed meant as the “holding” the Court's language characterized it to be. It is true that a defendant

requirement now embodied in 28 U.S.C. § 1257(a) (1994)). This argument revolved around the fact that further proceedings were still to be had on the merits in the state appellate courts. The Pennsylvania Supreme Court had determined that the intermediate appellate court had erred in finding that the grant of a demurrer barred further prosecution. It then had remanded to the intermediate court for it to pass upon the question of whether the trial judge had correctly granted the demurrer. See *Commonwealth v. Smalis*, *sub nom.* *Commonwealth v. Zoller*, 450 A.2d 394, 401–02 (Pa. 1985), *rev'd sub nom.* *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). These further proceedings might still have eventuated in a finding in favor of the defendant on the merits, thus ending the case. Alternatively, the state appellate courts might have ruled against the defendant and authorized further proceedings, at that time making the case more clearly ripe for U.S. Supreme Court adjudication. For arguments relating to this point in the briefs in the Supreme Court, see [Defendants'] Petition for Writ of Certiorari at 15–16, *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (No. 85-227); [Commonwealth's] Brief in Opposition to Petition for Writ of Certiorari at 28–29; Brief for Petitioners at 23; Brief for the United States As Amicus Curiae (supporting the Commonwealth) at 1–3.

In light of the earlier discussion in this Article (*see supra* text accompanying notes 2–9), it is interesting to note that in the course of arguing that the case was not ripe for Supreme Court review under the finality doctrine, the Brief for the United States As Amicus Curiae noted, “Here there could be no suggestion that consideration of the Commonwealth's appeal could itself violate federal rights of any kind.” *Id.* at 2 n.1. Alluding to the further intermediate appellate proceedings contemplated by the state supreme court's action, the brief also noted, “Petitioners do not assert—nor could they—that such proceedings would themselves violate double jeopardy constraints.” *Id.* at 2.

Proceedings in the *Smalis* case subsequent to the action of the Supreme Court of the United States are recounted in *Commonwealth v. Smalis*, 592 A.2d 669, 669–71 (Pa.), *cert. denied*, 502 U.S. 859 (1991).

finally adjudged to have a double jeopardy bar will have no stake in the appeal, once that final adjudication is reached. That is, a defendant for whom it has been decided at the highest appellate level that further trial court prosecution would be barred by double jeopardy has no interest in the appeal and can not be made to participate. As discussed above, only when that point is reached has the burden on the defendant in any court, trial or appellate, come to an end under the Double Jeopardy Clause. The Court's language suggesting that an appeal "would frustrate the interest of the accused in having an end to the proceedings" seems incorrect because a defendant would not be obliged to participate further in any way. For such a defendant the appeal is entirely moot. But, contrary to the Court's implication and under long-established principles, the appeal proceeding is not itself covered by the Double Jeopardy Clause.

Were the *Smalis* language to be read as language intended to bring an appellate proceeding directly within the bar of the federal Double Jeopardy Clause, *Smalis* would create a dramatic and basic shift both in previously defined Supreme Court double jeopardy law and in the states' independent ability to decide whether to issue advisory opinions. Such a striking change in constitutional law should not be attributed to this language without a clear indication that the Court meant to overrule long-established lines of case law and to work major changes to basic principles.⁶¹ *Smalis* is thus best read against

61 Given the power of Supreme Court language to take on a life of its own beyond the context of the case, there is always the danger that the *Smalis* language will be cited to support the somewhat misstated and telescoped view that the taking of the appeal itself will violate the Double Jeopardy Clause. See *Commonwealth Dep't of Envtl. Resources v. Monarch Pallet Corp.*, 532 A.2d 1246, 1248 (Pa. Commw. Ct. 1987) ("According to *Smalis*, the grant of a demurrer is a functional equivalent of an acquittal. DER's appeal to this Court is thus barred because of the doctrine of double jeopardy."); see also *Delap v. Dugger*, 890 F.2d 285, 307 (11th Cir. 1989) (stating that a judgment of acquittal may not be appealed when a second trial would become necessary following a reversal); *Commonwealth v. Stein*, 526 A.2d 411, 412 (Pa. Super. Ct. 1987) (stating that "in *Smalis*, the U.S. Supreme Court held that a grant of demurrer to an accused cannot be appealed where reversal would lead to further trial proceedings thereby implicating the double jeopardy clause"); *Commonwealth v. Williams*, 541 A.2d 7, 7-8 (Pa. Super. Ct. 1988) (stating emphatically that the Double Jeopardy Clause was never intended to impose a general ban on prosecutorial appeals, but only further proceedings related to the accused's guilt or innocence).

The danger of misformulation exists, of course, even without the additional impetus provided by *Smalis*. See, e.g., *State v. Paoella*, 554 A.2d 702, 708 (Conn. 1989) (stating that "[t]he double jeopardy clause of the fifth amendment to the federal constitution prohibits the prosecution of appeals from judgments of acquittals" and finding that an acquittal bars the court from reviewing the prosecution claim by relying on language in *United States v. Scott*, 437 U.S. 82, 91 (1978), which is correct for

the formulation of the issues actually raised and the procedural setting of the case, including the background point that the state involved refuses to issue advisory opinions.⁶² The *Smalis* language also serves as a reminder of the need to sort out the exact relationship of double jeopardy to prosecution appeals.

V. CONCLUSION

Inaccurate statutory and case law formulations concerning the role that double jeopardy law plays in prosecution appeals further complicates an already complex area of the law. Such formulations also may inject unintended and unwarranted limitations on prosecution appeals.

Statutes that take inaccurate account of the precise effect of double jeopardy law with regard to prosecution appeals raise several major legislative and judicial dangers. First, they may appear to invalidly authorize appeals in cases when only nonjusticiable cases can result. Second, they can bar appeals in states where double jeopardy law, although barring reprosecution, would not bar the prosecution appeal itself because state law allows for advisory opinions. Both situations create severe problems of interpretation for state courts and may needlessly confront state courts with difficult and unintended state constitutional law problems. Moreover, inexact statutory statements concerning the effect of double jeopardy law prevent a clear focus on the precise situations in which legislators actually desire to authorize or prohibit prosecution appeals, even when double jeopardy law does not bar reprosecution.

Similarly, case law inexactly formulating the place of double jeopardy in prosecution appeals—perhaps suggesting that double jeopardy law directly bars a prosecution appeal—raises its own additional dangers. In the face of inaccurate statements about the reach of federal double jeopardy law, the danger exists that some states will be improperly precluded from effectuating a system actually allowed by the federal constitution: a system in which prosecutors can obtain an advisory opinion on the underlying issue, with the ruling applicable only to future cases. Only a minority of state legislative schemes allow such advisory opinions in prosecution appeals, but neither the number of states effectuating such a system nor the wisdom of such a

federal cases in light of the federal statutory formulation but which is not necessarily true for state cases); *State v. Gustin*, 510 P.2d 1290, 1294 (Kan. 1973) (stating before *Smalis* was decided that “[a]ppellate review of the decision after acquittal would constitute double jeopardy”).

62 See *supra* note 57.

procedure is the critical point here. Instead, the point is that where state law allows and elects such a system, federal doctrine permits it.

A precise analysis of the actual relationship of double jeopardy to prosecution appeals presents clearly the actual choices on which the appropriate decision makers—legislators and judges—can best focus.